

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SYSCO CENTRAL CALIFORNIA, INC.

Employer

and

Case 32-RC-272441

TEAMSTERS UNION LOCAL 386,  
INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS

Petitioner

ORDER

The Employer's Request for Review of the Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review.<sup>1</sup>

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<sup>1</sup> In denying the Employer's Request for Review with regard to the Regional Director's determination that the petitioned-for unit is appropriate, we find no merit in the Employer's allegation that the Regional Director violated its due process rights by the hearing officer's conduct of the hearing.

On November 9, 2020, the Board issued its decision in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), which sets forth the guidelines and parameters applicable to determining the propriety of a mail-ballot election under the "extraordinary circumstances" of the Covid-19 pandemic. In denying review, we find that the Regional Director erred in finding that the mere presence of two variants of the SARS-CoV-2 virus – B.1.1.7. and B.1.351 – constituted "other similarly compelling considerations" within the meaning of *Aspirus* factor six sufficient to justify holding the election by mail ballot. In *Rush University Medical Center*, 370 NLRB No. 115 (2021), the Board found that the Acting Regional Director erred in directing a mail-ballot election based on the mere existence of new variants where the Center for Disease Control had neither determined that they were "variants of high consequence" nor mandated changes in prevention strategies. At present, the CDC has neither identified the cited variants as being variants of high consequence nor changed its prevention strategies in response to them. Accordingly, we find that the Regional Director misapplied factor six of *Aspirus* in directing a mail ballot election.

Nevertheless, we deny review because current conditions in Stanislaus County, California, where the Employer's main facility is located, support the holding of a mail-ballot election. As of September 17, 2021, the 7-day testing positivity rate for this county is well over the five percent threshold level established in *Aspirus* factor 2 as justifying the direction of a mail-ballot election. *Aspirus*, supra, slip op. at 5-6; "7 Day Moving Averages, Stanislaus County, California," available at: <https://covid.cdc.gov/covid-data-tracker/#county-view>. In addition, because the election has already been held, setting it aside at this point—especially given the real probability that a mail-ballot election would be ordered—would waste the Board's resources, delay the resolution of the question concerning representation, and be a disservice to

LAUREN McFERRAN,	CHAIRMAN
MARVIN E. KAPLAN,	MEMBER
JOHN F. RING,	MEMBER

Dated, Washington, D.C., September 28, 2021.

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the employees who cast their ballots in good faith. Under these circumstances, we decline to set aside the completed mail-ballot election.

Chairman McFerran joins her colleagues in denying the Employer's Request for Review, including with respect to the Regional Director's finding that the unit of delivery drivers and backhaul drivers at the Employer's facilities in Modesto, Sacramento, and Merced, California is an appropriate unit. As to that issue, Chairman McFerran adheres to her dissent in *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017) and observes that the unit would also be appropriate under *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), *enfd. sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), which *PCC* overruled.

Chairman McFerran also agrees to deny review of the Regional Director's mail ballot determination for the reasons given in her separate opinion in *Aspirus*. This case demonstrates how the Board's *Aspirus* framework for determining the appropriateness of mail ballots during the COVID pandemic can "be quickly overtaken by events." *Aspirus*, 370 NLRB No. 45 (2020), slip op. at 9 (concurring opinion). This abiding threat of a pandemic that "does not stand still," *id.*, slip op. at 10, is one reason that a default preference for mail ballots for the duration of the COVID pandemic is warranted. For these reasons, Chairman McFerran agrees with her colleagues that denial of review is appropriate and that setting aside the election at this point would be inefficient and unfair to the unit employees.

In denying review of the Regional Director's determination that the unit of delivery drivers and backhaul drivers at the Employer's facilities in Modesto, Sacramento, and Merced, California is an appropriate unit, Members Ring and Kaplan note that the Employer's Request for Review has failed to establish that the Regional Director erred in finding that "the petitioned-for unit falls within the Employer's own administrative and operational lines." For example, the Employer contends that "there are no starting point specific seniority lists or rankings," but the record includes a copy of the seniority lists maintained by the Employer, which segregate the North drivers, South drivers, and shuttle drivers into separate lists, and the Employer's Director of Transportation Gavin Freeman testified that, for the annual route bid, "whatever locations the drivers are, we fill those routes first from the most senior guy, down" and only after those bids are filled will the Employer put any open route up for bid for all employees. Likewise, the Employer asserts that the Regional Director erred in finding that interchange between North and South drivers was limited, but the evidence offered is unconvincing because it fails to show that sufficient interchange actually occurred between the North and South facilities, including the evidence of interchange between delivery, backhaul, and shuttle drivers.